
Convergence and Divergence in International Economic Law and Politics

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Abstract

This article explores the phenomena of convergence and divergence in international economic law. It argues that both international trade and investment law have been forced to overcome a structural (legal-institutional) prioritization of market goals via competing social regulatory concerns. It is at this stress point that we argue that a powerful set of converging and procedurally orientated hermeneutics can be identified in the jurisprudence that, properly employed, could significantly bolster the elasticity and durability of state commitment to international economic law constraints. There remain, however, continuing textual and systemic divergences at play, which opponents will often dismiss for reasons of stasis or capture. On deeper analysis, however, key divergences may well be rational considering the unintended or adverse consequences that can flow from the unfiltered transplant of norms, doctrinal tests or institutional models.

1 Introduction

Trade and investment are salient and dynamic fields in international economic law. Yet their connections have been under-explored and under-theorized. Some scholars, attracted to a pluralist premise, emphasize the original political and historical conditions that led to distinct normative systems for trade and investment at international law.¹ Others identify the contestable manner in which trade and investment

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¹ See Alvarez and Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', in K.P. Sauvant (ed.), *Yearbook of International Investment Law and Policy* (2009) 379; Alvarez and Brink, 'Revisiting the Necessity Defense: *Continental Casualty v. Argentina*', in C.S. Herrmann and J.P. Terhechte (eds), *Yearbook of International Investment Law and Policy* (2011) 4.

law operate to supply analogical guidance or reasoning from one system to the other.² Another group accepts discrete interconnections, and even functional convergence, between the fields, but their observations typically centre on formalities whether common texts (such as national treatment), common vehicles (such as regional trade agreements) and parallel proceedings (such as tobacco-labelling challenges under both the World Trade Organization [WTO] and bilateral trade agreements [BITs]).³

When we consider the long evolutionary arc of these fields, the picture is both more complex and contradictory than offered by these accounts. Certainly, the original rationales for institutional separation were contingent and are now in the advanced stages of erosion. The contemporary drivers of deeper engagement are formidable, traversing powerful considerations of economic logic (not least, the emergence of global value chains), sociological movements (through common adjudicators) and legal reality (such as overlapping treaty norms and litigation).⁴ Yet, even here, it would be a mistake to place too much emphasis on these surface features. In our view, the real convergence driver is a common strategic challenge. Both systems have been forced to overcome a structural (legal-institutional) prioritization of market access or protection of rights or privileges of foreign stakeholders (traders or investors) *vis-à-vis* competing social regulatory concerns. Striking an appropriate balance between these vital goals is central, in our view, to maintaining the elasticity and durability of state commitment to these international economic law constraints.

To be sure, there is continued variance (though narrowing) in the choice and temporality of response to this shared challenge across the two systems. At inception, the framers of the trade law system presciently recognized that economic activity cannot exist in clinical isolation from social context. The 1947 General Agreement on Tariffs and Trade (GATT) reflects a powerful compromise of ‘embedded liberalism’ that balances free trade and social regulation.⁵ With the heavy path dependence that characterizes the evolution of international investment law, it is only comparatively recently that negotiators have begun to inject similar levels of express flexibility for public goals in newer treaties. There are, however, inherent limits to the balance that can be achieved through express exceptions, whether because of pragmatics and transaction costs (if seeking reform of a treaty) or in their static (exhaustive) framing (where included in an existing treaty).⁶ Ultimately, adjudicators in both systems will play a vital

² See Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’, 107 *American Journal of International Law (AJIL)* (2013) 45 (attributing the existence of different paradigms to conflicting positions on international investment law).

³ See Lee, ‘Complementing Each Other or Stoking Complexity?: Interaction between International Investment Law and International Trade Law’, 47 *Journal of World Trade* (2013) 421; Alford, ‘The Convergence of International Trade and Investment Arbitration’, 12 *Santa Clara Journal of International Law* (2013) 35.

⁴ See generally J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), at 10–20.

⁵ Ruggie, ‘Embedded Liberalism and Postwar Economic Regimes’, in J. Ruggie (ed.), *Constructing the World Polity: Essays on International Institutionalization* (1998) 62. In a broader vein, see also Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’, 91 *American Journal of Sociology* (1985) 481, at 482. General Agreement on Tariffs and Trade 1947, 55 UNTS 187.

⁶ On the dating of the move to insertion of flexibilities in international investment law, see Kurtz, *supra* note 4, at 193–212.

role in distinguishing economically insensible interventions from legitimate public regulation. And it is at this point that we can identify a powerful set of converging hermeneutics between the trade and investment regimes that seek to balance market values and regulatory ideals. Importantly, these deep currents are not simply provision specific (thus, confined to common norms). They reflect instead an overarching procedural tendency that is sufficiently extensive in doctrinal latitude to enable them to be properly employed across different legal settings.

Admittedly, not all states (or, for that matter, adjudicators) share a preference for greater convergence, whether substantively or jurisprudentially. One can still locate a number of diverging elements between international trade and investment law: the original goal of investment arbitration is a proper (good) settlement in a given dispute rather than any general law-making;⁷ the nature of remedy in investment arbitration is retrospective (*ex tunc*), while the WTO remedy is only prospective (*ex nunc*) and there exists a fundamental public–private law distinction between these two legal systems.⁸ Moreover, by its very nature, the strategic role played by judicial actors in mediating the thickening relationship between the two systems is inherently political and contestable, subject to the criticism of ‘judicial activism’.⁹ All in all, the real picture is far more complex. Nonetheless, this article contends that there are sufficient systemic and practical grounds for convergence. Note that convergence does not mean conformity. While initial divergences between two regimes converge, remnant divergences might legitimately limit the conformism thesis.

In tracing the contours of convergence and divergence across international economic law, part 2 of this article begins by identifying the distinctive historical paths between international trade and investment law. While one can locate an early historical overlap between these two systems from antiquity to the colonial era, their evolutionary paths diverged for a series of time-limited and contingent factors in the post-World War II period. Yet, despite this separation, both systems are united in a common pathway reflecting the nature in which commerce is inherently embedded in its surrounding environment. Part 3 documents this gradual and shared jurisprudential orientation, tracing the tectonic shift across both systems from pro-market proclivities to a mature reconciliation between market and social values. Part 4 then explores the political fissures and lingering divergences across the two systems, shaped by often legitimate variance in the socio-political preferences of key states parties.

⁷ See, e.g., Schultz, ‘Against Consistency in Investment Arbitration’, in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 297.

⁸ See Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’, 14 *Journal of International Economic Law (JIEL)* (2011) 469, at 503 (aptly observing that many disagreements over issues of international investment law reflect a fundamental public–private distinction between adjudication and arbitration and, therefore, might not be easily addressed by certain doctrinal solutions).

⁹ See, e.g., Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, 98 *AJIL* (2004) 247, at 247–248 (observing a wide range of criticisms on the World Trade Organization’s (WTO) Appellate Body’s alleged judicial activism). Regarding a similar position from political scientists, see Goldstein and Martin, ‘Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note’, 54 *International Organization (IO)* (2000) 603.

2 Trade and Investment: Pre-Modern Overlap to Divergence and Path Dependence

A *Overlap: Shared Origins*

From antiquity, trade and investment have been two representative forms of foreign commerce. Without the sophisticated institutional paraphernalia of modernity, primordial foreign commerce has often exhibited a natural amalgamation of trade and investment activities. While ancient laws and treaties governed various commercial relations between a cosmopolitan economic hub (such as ancient Athens and Rome) and other parts of the world, these laws and treaties rarely divided between trade and other forms of international commerce, such as international investment.¹⁰ Typical foreign commercial activity in ancient Athens might have involved trade (export and import) in grains and/or an overseas investment in speculative properties, such as real estate and silver mining.¹¹ Indeed, the existence of a resident foreign counsel (*proxenos*) recognized by the Athenian government demonstrates the ubiquity of foreign merchants (commercial presence) in ancient Athens.¹²

Likewise, in the Tang Dynasty (AD 618–907), trade with foreign kingdoms expanded dramatically,¹³ so much so that many foreign traders, such as Persians and Arabs, even formed their own residential communities called *fanfang* ('barbarian districts') in large cities.¹⁴ Functioning as 'nodes of trade diasporas', these communities networked with their home producers and channelled foreign products into local markets in China.¹⁵ The Tang Dynasty allowed these communities to self-govern in accordance with their own cultural and religious customs.¹⁶ In this accommodating environment, foreign commerce, in the form of both trade and investment, flourished in ancient China.

In Medieval Europe, foreign investors (often acting as associations) would seek assurances from sovereigns that their interests would be protected from negative actions both by the sovereign and local actors. If sufficiently powerful, these demands would extend to privileges and benefits that nationals themselves did not enjoy. In AD 991, for instance, the Byzantine Emperors Basil II and Constantine VII granted to the merchants of Venice the rights to trade in the ports and other places of the Byzantine Empire without paying customs duties as well as the right to a quarter in Constantinople for dwelling and trading.¹⁷ Similar concessions and franchises were taking place at the same time across western, northern and eastern Europe.¹⁸

¹⁰ J. Mo, *International Commercial Law* (1997), at 4–5.

¹¹ L. Casson, *Ancient Trade and Society* (1984), at 23–27, 42–43.

¹² *Ibid.*, at 33.

¹³ E.H. Parker, *China: Her History, Diplomacy, and Commerce, from the Earliest Times to the Present Day* (1917), at 43.

¹⁴ M.S. Abramson, *Ethnic Identity in Tang China* (2007), at 139.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ J. Salacuse, *The Law of Investment Treaties* (2010), at 80.

¹⁸ *Ibid.*

By the post-Industrial Revolution era, foreign commerce, which continued to engage both trade and investment, was an important tool for fierce imperialistic competition among Western powers. State-chartered companies traded with, and invested in, colonies.¹⁹ At the same time, armed with a mercantilist ideology, states blended foreign commerce with diplomacy and signed a number of boilerplate friendship, commerce and navigation (FCN) treaties. Here, too, we find overlap in legal coverage. States aimed to promote and protect trade and investment via those FCN treaties,²⁰ typically through an explicit guarantee of ‘freedom of commerce’.²¹ Even in the absence of textual instruction, international courts would naturally rule in line with dominant state and commercial practice of the period. In the *Oscar Chinn Case*, for instance, the Permanent Court of International Justice offered this unitary interpretation of a key protection in a 1919 treaty:

Freedom of trade, as established by the Convention, consists in the right – in principle unrestricted – to engage in *any* commercial activity, *whether it be concerned with trading properly so-called*, that is the purchase and sale of goods or *whether it be concerned with industry*, and in particular the transport business; or, *finally*, *whether it is carried on inside the country or; by the exchange of imports and exports*, with other countries.²²

Under the FCN treaties, private investors could rely on diplomatic protection provided by their home governments. This strong public presence in the early historical manifestations of foreign commerce was encoded into the public international law that governed trade and investment. Some of this public legacy still lingers in the modern era, as revealed by the pro-state position taken on diplomatic protection by the International Court of Justice in the *Barcelona Traction* case.²³

Importantly, however, these shared historical origins do not necessarily mean that the trade and investment regimes pursued identical normative goals. Even in a prototypical BIT such as the Jay Treaty, the controlling purpose of the investment regime centred on protection of ‘properties’ held by foreigners.²⁴ As José Alvarez aptly

¹⁹ See, e.g., N. Ferguson, *Empire: How Britain Made the Modern World* (2003).

²⁰ K.J. Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010), at 38 (noting that ‘in the Colonial Era in the nineteenth and early twentieth centuries ... trade and property protection provisions appeared in the same agreement’). See also Walker, Jr., ‘Modern Treaties of Friendship, Commerce and Navigation’, 42 *Minnesota Law Review* (1958) 805.

²¹ In *Oil Platforms*, the International Court of Justice (ICJ) was called upon to interpret the key terms of a 1955 friendship, commerce and navigation treaty between Iran and the USA (which had replaced an earlier agreement concluded in 1928), which included this general guarantee of ‘freedom of commerce and navigation’. *Case Concerning Oil Platforms (Iran v. US)*, Judgment, 12 December 1996, ICJ Reports (1996) 90, paras 40–46. See DiMascio and Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Coin?’, 102 *AJIL* (2008) 48, at 51.

²² *Oscar Chinn Case (Britain v. Belgium)*, 1934 PCIJ Series A/B, No. 63, at 84 (emphasis added).

²³ *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports (1970) 3. Ironically, however, *Barcelona Traction* also laid the seeds for the separation of the two systems insofar as capital-exporting states came to be dissatisfied with the political limits of the diplomatic protection model exemplified by the outcome in this case (being no remedy for the shareholders because the state of nationality of the company refused to initiate a claim).

²⁴ Treaty of Amity, Commerce and Navigation between His Britannick Majesty and the United States of America 1794, 8 Stat. 116.

observes, the protection of property rights under the US Constitution through the Takings Clause, naturally shaped the normative contours of early investment treaties signed by the USA.²⁵ This goal of protection of foreign property (including contractual rights) is distinguishable, in degree and orientation, from the targeted emphasis placed on combating discrimination in the early trade treaties.²⁶

B Divergence (and Path Dependence): Separate Historical Movements in the Post-War Era

The post-war international economic architecture originally acknowledged an inseparable root of trade and investment. The International Trade Organization (ITO)'s Havana Charter sought to discipline trade barriers while also contemplating investment protection clauses.²⁷ However, due to strong opposition by newly independent states, for one, the provisions directed at foreign investment were substantially diluted from earlier articles put forward by the USA as well as those classically found in the FCN treaties of the era.²⁸ With the defeat of the ITO,²⁹ the GATT – which had been signed as an interim agreement – was the only legal instrument left standing.³⁰ This deep institutional separation of trade from foreign investment issues in the multilateral arena would continue until the commencement of the Uruguay Round negotiations in the mid-1980s.

Diverging evolutionary paths between the trade and investment regimes in the post-war era are partly a function of immediate modalities or transaction patterns. As patent in its very appellation, the initial concern of the GATT was to slash import duties on the cross-border exchange in goods.³¹ The quantifiable and divisible nature of tariffs made their reduction through negotiation relatively easy over time, especially given the political importance of achieving a base level of reciprocity of concessions among the membership.³² A reciprocal exchange of concessions is often fundamental to convincing domestic interests of the overall benefits of trade liberalization. These tariff reduction endeavours continued in successive and periodic negotiating rounds with early successes adding ever-growing momentum. International trade law thus became 'multilateralized' at a relatively early stage, not only by formal design choices at inception but also in its practical operation over time. By contrast, an investment regime is inherently less amenable to this political economy. Limitations on market access to foreign investment do not take the form of simple border barriers such as

²⁵ See notably Alvarez, 'The U.S. Contribution to International Investment Law', in J.E. Alvarez (ed.), *American Classics in International Law: International Investment Law* (2017) 1.

²⁶ *Ibid.*

²⁷ WTO, Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization (the Havana Charter), UN Conference on Trade and Employment, UN Doc. 1948.II.D.4.1 (1948), ch. III (Economic Development and Reconstruction).

²⁸ T.L. Brewer and S. Young, *The Multilateral Investment System and Multinational Enterprises* (1998), at 67.

²⁹ W. Diebold, *The End of the ITO* (1952), at 1–37.

³⁰ J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998), at 16–18.

³¹ General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194.

³² B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2001), at 25–33.

taxes whose effects are easily quantifiable. They engage difficult and sensitive questions of security objectives, development strategies and regulatory maturity.

Yet, even more fundamentally, we find significant variances in early political motivations underpinning the two systems. The framers of the GATT were deeply disabused of protectionist policies widespread in the inter-war period.³³ These disastrous outcomes affirmed the Kantian belief that economic discrimination engenders adverse political consequences such as instability in trade policies and resulting political irritation.³⁴ And it is clear that the framers of the modern trade architecture attributed destructive trade discrimination in the inter-war period to the proximate causes of World War II.³⁵ Most-favoured-nation (MFN) treatment within the GATT in turn was to play a central remedial role in international efforts to both reconstruct the world economy and embed political cooperation. Politics are also evident in the sophisticated balance struck at the outset in the GATT. National treatment would play a vital role in preserving the value of tariff concessions politically negotiated among the states parties to the GATT. That obligation – which has a powerful, economic logic – ultimately ensures that conditions of competition within the state are not modified by government intervention so as to advantage a domestic product over its foreign competitors. Yet, under the insightful compromise of ‘embedded liberalism’,³⁶ which had been heavily influenced by the experience of the US negotiators with New Deal policies,³⁷ various GATT provisions also actively contemplated the priority of domestic politics and intervention in certain situations to safeguard domestic stability. These flexibilities, including explicit exceptions for public values such as health and environmental protection,³⁸ guaranteed significant heterogeneity in regulatory and redistributive conditions³⁹ and, thus, offered bounded latitude for states to adjust their engagement with the system in times of significant political and societal pressure.

By contrast, a very different set of political factors shaped the contours of early investment treaties. An array of peoples and groups demanded political independence from the strictures of colonial power relations. The demand for political independence was naturally accompanied by a desire for economic sovereignty. Yet the productive capacity of many of these states remained dependent on infrastructure and investment from former colonial powers. The harsh experience of colonialism saw many newly independent states adopt political and economic models in the post-World War II period, hostile to foreign presence and ownership of key assets (particularly

³³ From 1929 to 1934, world trade levels declined by 66 per cent. G. Winham, *The Evolution of International Trade Agreements* (1992), at 30.

³⁴ I. Kant, *Perpetual Peace: A Philosophical Essay*, translated M. Campbell Smith (3rd edn, 1917 [1795]), at 157.

³⁵ R. Gardner, *Sterling-Dollar Diplomacy* (1956), at 4.

³⁶ Ruggie, *supra* note 5.

³⁷ Burley, ‘Regulating the World: Multilateralism, International Law and Projection of the New Deal Regulatory State’, in J. Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (1993) 125.

³⁸ GATT, *supra* note 31, Art. XX.

³⁹ Afilalo, ‘Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights’, Jean Monnet Working Paper no. 01/03 (2013), at 7.

natural resources) or market systems more generally. Foreign investment came to be seen as a continuing proxy for colonialism, with expropriation being used as a visible mechanism to complete the decolonization process.⁴⁰ Thus, the decades following World War II were marked by a wave of forced takings of foreign assets throughout the developing world.⁴¹ Expropriation was no longer an isolated and exceptional event (as it had been throughout the 19th and early 20th centuries); its frequent invocation reflected a fundamental realignment of inter-state interests.

Capital-exporting countries, which were often former colonizers, naturally desired to secure the maximum guarantee of business freedom in capital-importing countries, many of which were former colonies, and discouraged local authorities from interfering with foreign investors.⁴² Fear for nationalization thus led capital-exporting countries to strongly hedge against expropriation or other hostile state intervention through the negotiation of BITs. Thus, most BITs were prone to the Western-style pro-investor or pro-investment standards of review that had long been resisted by developing countries.⁴³ Overall, the gestalt of early BITs was custom plus: codified customary international law in key areas (such as fair and equitable treatment), bolstered by new investor-friendly provisions (including the umbrella clause) and strengthened dispute settlement mechanisms. In particular, this investor–state arbitration mechanism ushered in radical change measured against the traditional state-to-state public international law standard. This pro-investor prescription sidelined the conventional championing process and enabled (Western) investors to directly challenge investor-unfriendly measures by host (developing) countries. It accorded foreign investors many procedural (jurisdictional) privileges over those cases involving public policies and empowered them in an unprecedented system of ‘arbitration without privity’.⁴⁴

By the late 1980s, free trade and investment policies gained political traction alongside Western triumphalism, powered by a dazzling phenomenon of globalization and silhouetted against the epic drama of the fall of the Berlin Wall.⁴⁵ States parties to

⁴⁰ L.T. Wells and R. Ahmed, *Making Foreign Investment Safe: Property Rights and National Sovereignty* (2007), at 38. On the parallel between colonialism and the modern phenomenon of ‘market-dominant minorities’, see A. Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (2003), at 120–121.

⁴¹ Brewer and Young, *supra* note 28, at 53. Table 2.3 of this reference summarizes trends in expropriation from 1960 to 1992. The mean number of expropriations in this period was as follows: 1960–1064: 11; 1965–1069: 16; 1970–1974: 51; 1975–1979: 34; 1980–1984: 3; 1985–1989: 0.4; and 1990–1992: 0.

⁴² S.K.B. Asante, *Transnational Investment Law and National Development* (1981), at 24.

⁴³ Wilner, ‘Acceptance of Arbitration by Developing Countries’, in T.E. Carbonneau (ed.), *Resolving Transnational Disputes through International Arbitration* (1984) 286.

⁴⁴ Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’, 22 *European Journal of International Law (EJIL)* (2011) 875, at 880; Paulsson, ‘Arbitration without Privity’, 10 *ICSID Review (ICSIDR)* (1995) 232.

⁴⁵ See R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), at 10–11; World Bank, *World Development Report 2005* (2004), at 176–178. See also Steinberg, ‘In the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO’, 56 *IO* (2002) 339, at 358–360 (observing that developed countries, such as the USA and the European Union (EU), enjoyed an increased leverage in negotiations with developing countries after the fall of the Soviet Union).

the GATT responded to this globalist *zeitgeist* by both dramatically expanding the subject coverage of the trade regime and thickening its institutional capacity (notably through the development of a more judicial system of dispute resolution). By the completion of the Uruguay Round, the new WTO had expanded its remit far beyond the simple coverage of trade in goods into areas of trade in services and trade-related intellectual property rights. Unlike the positive sum benefits that accrue from the reduction of explicitly trade-distorting border barriers (such as tariffs) under the GATT, some of the new WTO disciplines have far more ambiguous functional (developmental and/or welfare) effects.⁴⁶

International investment law too was shaped fundamentally by tectonic shifts of the late 1980s onwards. The total number of BITs quintupled in the 1990s – from 385 (1989) to 1,857 (1999) – involving almost all (173) states in the international community.⁴⁷ With this dramatic expansion of the BIT network, Alvarez has aptly observed that '[t]he 1990s, not the 1980s and certainly not the 1970s, were the era when the modern investment regime was born'.⁴⁸ Strikingly, there is clear evidence of a deep path dependence at play.⁴⁹ The basic features and content of the strict BIT model (developed during the era of hostility to foreign investment throughout the 1960s and 1970s) continued to be replicated in the fertile growth period of the 1990s. Of course, many developing states had begun to shift during the 1990s from political and developmental models predicated on opposition to foreign and private capital. The success of a closed economy to external forces (such as via import substitution) had always depended on its ability to generate successful and competitive industrial champions. Yet, by the late 1980s, it became clear that this model was producing disappointing results for those countries that had chosen this development path (especially in Sub-Saharan Africa and Latin America).⁵⁰ In stark contrast, policies linked to export

⁴⁶ See, e.g., K. Maskus, *Intellectual Property Rights in the Global Economy* (2000) (on the economic implications of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299); Jinji, 'An Economic Theory of the SPS Agreement', in B. Mercurio and K.-J. Ni (eds), *Science and Technology in International Economic Law* (2014) 53 (on the economic case for the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) 1993, 1867 UNTS 493); Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective', 2 *Journal of Legal Analysis* (2010) 473 (on the inability of the WTO Agreement on Subsidies and Countervailing Measures 1994, 1869 UNTS 14, to distinguish socially constructive subsidies from those that are economically objectionable).

⁴⁷ United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties: 1959–1999* (2000).

⁴⁸ Alvarez, 'The Once and Future Foreign Investment Regime', in M. Arsanjani *et al.* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010) 607, at 615. See also Vandeveld, 'A Brief History of International Investment Agreements', in K. Sauvants and L. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (2009) 3, at 19 (noting that '[t]he global era in the history of international investment agreements begins at the end of the 1980s').

⁴⁹ Regarding path dependency, see Fioretos, 'Historical Institutionalism in International Relations', 65 *IO* (2011) 367, at 376; Pierson and Skocpol, 'Historical Institutionalism in Contemporary Political Science', in I. Katznelson and H. Milner (eds), *Political Science: The State of the Discipline* (2002) 699.

⁵⁰ For an overview of the policy failures associated with import substitution, see M. Trebilcock and R. Howse, *The Regulation of International Trade* (3rd edn, 2005), at 486–487.

growth and market openness had led to demonstrable economic growth in the newly industrializing countries of East Asia.⁵¹ The sovereign debt crisis of the 1980s also reduced developing state access to private bank loans. Unable to borrow to finance policies of economic development, most developing countries were eager to attract foreign direct investment for their development needs.

The continuing suitability of the classic form of BITs is increasingly tied to these deep and structural shifts in the construction of a liberal market economy. BITs became a mechanism to allow developing states, in particular, to offer a credible commitment to foreign investors and their stakeholders that their newly liberalized markets were open to foreign investment and that these domestic liberalization efforts would not be reversed. The close connection between the various aspects of domestic market reform and the entry into force of BITs is clearly evident in this account given by a former Costa Rican treaty negotiator:

The negotiation of every IIA is not only an international event, but also a manifestation of the domestic political economy of the signatory countries. In this regard, it is important to recognize that over the last two decades, most developing economies have undertaken deep and significant economic reform that has generated complex political and social dynamics within their own borders. The negotiation of IIAs is then, to a great extent, the result of such domestic dynamics.⁵²

For these developing states, BITs were an essential strategy to ‘lock in’ the processes of domestic economic reform and reduce the risk of short-term reversal to that policy path driven by vested interests.⁵³ To be sure, not all transition economies acted rationally in this period of BIT expansion. Other developed country officials seem to have committed to these strong sovereignty constraints under conditions of bounded rationality, without sophisticated cost–benefit analyses at the point of signing.⁵⁴

Yet the strength of the commitments represented by the entry into a stringent BIT – and, thus, the suitability of the older strict model – is especially important where the country concerned has a chequered history of relations with foreign investors and seeks to transition to a more liberal economic structure. Argentina, for example, has a long history of defaulting on its foreign debt obligations⁵⁵ and had given birth to the Calvo and Drago doctrines in the late 19th to early 20th centuries.⁵⁶

⁵¹ These countries though did not by any means simply adopt policies of unconstrained market liberalization. These states offered a range of targeted industrial policies including export incentives to specific firms. See *ibid.*, at 488. South Korea, for instance, prominently used a range of subsidies and incentives to encourage private investment in strategic industries. See generally A. Amsden, *Asia's Next Giant: South Korea and Later Industrialization* (1989).

⁵² Echandi, ‘What Do Developing Countries Expect from the International Investment Regime’, in J. Alvarez *et al.* (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 3, at 6.

⁵³ *Ibid.*, at 13.

⁵⁴ L. Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2017).

⁵⁵ See generally C. Marichal, *A Century of Debt Crises in Latin America* (1989).

⁵⁶ For an overview of these doctrines and the challenges they posed to the Western conception of customary international law as well as the phenomenon of gunboat diplomacy, see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 8–14.

In 1989, however, Argentina initiated a radical shift towards liberal economic policies in response to decades of stagnation and hyperinflation.⁵⁷ When it comes to investment treaty practice, Argentina is one of the 12 most active BIT signers of capital-importing states across the period 1959 to 1999.⁵⁸ Tellingly, there is a close temporal connection between Argentina's choice to begin signing BITs and its domestic reform strategy. Argentina's first BIT was signed in 1990, immediately after the 1989 election to liberalize its domestic economy.⁵⁹

While most developing countries opted for BITs and investment arbitration throughout the 1990s, some developing countries still remained sceptical of the merits of the market model. Nonetheless, the structural adjustment policies imposed on them by international financial institutions left many of them with little alternative but to liberalize their domestic economies.⁶⁰ Capital-exporting countries jawboned, and even pressured, developing countries into swallowing this bitter pill of investment liberalization.⁶¹ The International Monetary Fund and the World Bank also conditioned the provision of development loans to poorer states on their entry into BITs.⁶² Under the strain of competition to attract foreign direct investment (FDI), developing countries were 'bidding up' their concessions, including through generous arbitration clauses, to large foreign investors, many of whom were multinational companies from capital-exporting countries.⁶³

3 Overlap and Convergence in the Contemporary Period

Different historical paths bestowed the two systems with distinct institutional apparatus in the post-war era. While a centralized multilateral organization enshrined international trade law, international investment law was left largely to scattered bilateral arrangements. Nonetheless, a surprisingly salient current of jurisprudential convergence lurks underneath these diverging developmental pathways. This convergence is structurally anticipated given that both operable legal systems have been forced to undergo identity formation in response to turbulent and shared environmental challenges.

A *Modern Overlap: Reconnection*

The completion of the Uruguay Round negotiations and the establishment of the WTO marked the first modern reconnection between the two fields with new rules

⁵⁷ P. Blustein, *And the Money Kept Rolling In: Wall Street, the IMF and the Bankrupting of Argentina* (2005), at 23.

⁵⁸ R. Elkins, Guzman and Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1969–2000', 60 *IO* (2006) 811, at 821 (fig. 5).

⁵⁹ UNCTAD, *supra* note 47, at 26–27.

⁶⁰ R. Gilpin, *Global Political Economy: Understanding the International Economic Order* (2001), at 313–317.

⁶¹ Bhagwati, 'The Capital Myth: The Difference between Trade in Widgets and Dollars', 77 *Foreign Affairs* (1998) 7, at 11–12.

⁶² See generally Kalderimis, 'IMF Conditionality as Investment Regulation: A Theoretical Analysis', 13 *Social and Legal Studies* (2004) 103.

⁶³ Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia Journal of International Law* (1998) 639, at 671–672.

governing the overlapping coverage. Two of the final sets of legal instruments in the WTO included direct provisions dealing with foreign investment issues. First, there was the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement), which focuses on the imposition of certain performance requirements imposed on a foreign investor after entry into the host state.⁶⁴ Performance requirements are classically imposed by developing states on foreign investment as a means of extracting or influencing developmental gains. However, some of these requirements are also often inherently trade restrictive. For the latter reason, the TRIMs Agreement sets out an illustrative list of performance requirements, encompassing, *inter alia*, local content and purchasing conditions, trade-balancing requirements, foreign exchange restrictions and export performance requirements, and it deems these to be inconsistent with Articles III (national treatment) or XI (prohibition on quotas) of the GATT.⁶⁵ On one level, the TRIMs Agreement is merely an elaboration of the long-standing position that certain GATT rules can extend to a narrow range of investment measures with direct and identifiable impacts on trade.

In *Canada – Administration of the Foreign Investment Review Act*, a GATT panel had ruled that the Canadian practice of enforcing certain undertakings given by foreign investors, in order to gain regulatory approval to invest in Canada, breached the obligation of national treatment in Article III(4) of the GATT.⁶⁶ The panel found that local content undertakings by foreign investors to purchase goods of Canadian origin excluded the possibility for those investors to purchase available imported products, so that the latter were clearly treated less favourably than domestic products in contravention of the national treatment obligation.⁶⁷ Yet the TRIMs Agreement clearly goes beyond this defined subset to potentially encompass a much broader set of measures with little direct impact on trade flows, yet those same conditions could potentially be seen (by host states) as delivering key developmental gains.⁶⁸ An illustrative list holds open the possibility, for instance, that a WTO panel might find that technology transfer requirements (imposed on foreign investors) fall within the potential scope of the TRIMs Agreement. Indeed, mature investment treaty instruments (such as Chapter 11 of the North American Free Trade Agreement [NAFTA]) will often explicitly prohibit this type of performance requirement, further evidencing the modern overlap between the two fields.⁶⁹

⁶⁴ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 1994, 1867 UNTS 14; Marrakech Agreement Establishing the World Trade Organization 1994, 1867 UNTS 154; Agreement on Trade-Related Investment Measures (TRIMs Agreement) 1994, 1868 UNTS 186.

⁶⁵ TRIMs Agreement, *supra* note 64, Art. 2(2).

⁶⁶ *Canada – Administration of the Foreign Investment Review Act (Canada-FIRA)*, GATT Panel Report no. L/5504, BISD 30S/140, 7 February 1984.

⁶⁷ *Ibid.*, paras 5.8–5.9.

⁶⁸ Kumar, 'Performance Requirements as Tools of Development Policy: Lessons from Developed and Developing Countries', in K. Gallagher (ed.), *Putting Development First: The Importance of Policy Space in the WTO and IFIs* (2005) 179; Rodrik, 'The Economics of Exports Performance Requirements', 102 *Quarterly Journal of Economics* (1987) 633.

⁶⁹ North American Free Trade Agreement (NAFTA) 1994, 32 ILM 289, 605 (1993), Art. 1106(1)(f).

The second key legal outcome in the WTO that directly engages foreign investment is the General Agreement on Trade in Services (GATS).⁷⁰ While the GATS ostensibly pertains only to 'trade in services', it contains detailed provisions concerning FDI.⁷¹ This reflects the strategic fact that FDI tends to be especially important in service industries that are heavily regulated (such as banking), as it is often the only legally permissible modality for firms to enter and supply a foreign market. Indeed, the services sector is typically the largest recipient of inward FDI.⁷² Reflecting this vital economic reality, FDI through 'commercial presence' is included as one of the four modes of service supply covered by the GATS, although an actual scope of openness depends on each member's specific commitments in its national schedule.⁷³ Flexibility to pursue domestic prerogatives remains a feature of this new part of the WTO with the GATS continuing and deepening the embedded liberalism orientation of the original GATT. The GATS drafters notably expanded the list of bases upon which to exempt an otherwise inconsistent measure, including new freedoms to regulate for 'public morals' and 'public order'.⁷⁴

The legal and institutional overlap between the trade and the investment regime is driven largely by contemporary economic logic and reality. Global value chains have reinforced the organic links between trade and investment.⁷⁵ In the contemporary period, foreign investors often adopt complex integration strategies in order to acquire efficiency gains whereby production processes are split into various activities and carried out in locations best suited to the particular activity (which is strongly reflected in the factual matrices of key arbitral disputes).⁷⁶ The product sold or service supplied by the foreign investor in the host state will often comprise the end-point in an integrated supply chain that stretches across multiple jurisdictions.⁷⁷ Trade and investment are

⁷⁰ General Agreement on Trade in Services (GATS) 1994, 1869 UNTS 183.

⁷¹ *Ibid.*, at Art. I(1).

⁷² E.g., UNCTAD, *World Investment Report 2013* (2013), at 9.

⁷³ GATS, *supra* note 70, Art. I(2)(c).

⁷⁴ *Ibid.*, Art. XIV(a).

⁷⁵ UNCTAD, *G20 Fosters Synergies between Trade and Investment Promotion*, 13 November 2012, available at <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=351> (observing that 'trade and investment are inextricably intertwined today through global value chains'); 'Changes in Trade Challenge How We Manage Trade Policies, Lamy Tells Japanese Institute', WTO News, 16 March 2012, available at www.wto.org/english/news_e/sppl_e/sppl221_e.htm. See also World Bank, *Global Value Chain Development Report 2017: Measuring and Analyzing the Impact of GVCs on Economic Development* (2017), at 179–180 (introducing recent empirical studies demonstrating that free trade agreements (FTAs) covering WTO-plus topics, such as investment, may boost global value chain trade).

⁷⁶ See, e.g., ICSID, *ADF Group Inc. v. United States*, Award, 9 January 2003, ICSID Case no. ARB(AF)/00/1, paras 49–55 (concerning a Canadian company's plan to buy US steel, undertake fabrication work at its facilities in Canada and then ship the processed steel back to the USA in order to meet certain 'Buy America' conditions); NAFTA (UNCITRAL), *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000, para. 93 (concerning the establishment of a subsidiary of a US company in Canada to contract for waste remediation services where the waste would be shipped for processing at facilities in the USA).

⁷⁷ For an overview of the importance of production networks in the global economy (where efficiency-seeking foreign investment and foreign trade are necessarily complements rather than substitutes), see WTO, *World Trade Report 2011: The WTO and Preferential Trade Agreements – from Co-Existence to Coherence* (2011), at 7–10. See also UNCTAD, *Global Value Chains and Development: Investment and Value Added in the Global Economy* (2013), at 16–25.

thus no longer simple substitutes but, rather, complements in penetrating international markets. Not surprisingly, this has profoundly influenced the content not only of the WTO but also of the growing universe of bilateral and regional free trade agreements (FTAs). As Debra Steger has aptly described, '[t]he goal of investment chapters in these [preferential trade agreements] is not solely protection of investments but also market access'.⁷⁸ This shift in treaty coverage has significant implications for the growing connection between international trade and investment law. The comingling of 'trade' and 'investment' treaty negotiators within the same institutional context (when negotiating bilateral and regional FTAs) has begun, as we will see, to produce a more diverse set of perspectives on what investment commitments should contain. Aspects of WTO law are, sometimes crudely, used as a legal mechanism to achieve a more sophisticated accommodation between investment protection/liberalization and competing public values.

This economic driver will continue to push the two systems together. As global businesses embrace the increasing nexus between trade and investment, they will formulate their legal demands to reflect this new economic reality. Not surprisingly then, a growing number of disputes involve both trade and investment law issues.⁷⁹ In the early stages of WTO dispute settlement, this typically involved the use of local content conditions for investment in the automotive sector.⁸⁰ More recently, these disputes have engaged the politically complex use of local content requirements in the construction of a renewable energy sector with some of these measures triggering concurrent complaints both before the WTO⁸¹ and through dedicated investment law protections.⁸² Conflicting legal outcomes between trade and investment law in an overlapping case would be both baffling and taxing to global businesses. Uncertainty breeds enormous transaction costs. Opportunistic legal strategies are likely to emerge as some arbitrators might be tempted to cherry-pick scattered jurisprudential fragments for self-serving purposes. Adventurous and frivolous lawsuits may ensue. In sum, as the WTO Director General Roberto Azevêdo aptly observed, 'a more globalised world rewards policy coherence – and punishes incoherence'.⁸³

B A Common Challenge: Pro-Market Bias

By the late 1990s, both systems had developed a structural pro-market bias that would slowly drive convergence between them in the face of turbulent and shared

⁷⁸ Steger, 'International Trade and Investment: Towards a Common Regime?', in R. Ehandi and P. Sauve (eds), *Prospects in International Investment Law and Policy* (2013) 156, at 162–163.

⁷⁹ See, e.g., Afilalo, *supra* note 39, at 14 (observing that 'as it currently stands, the doctrinal expression of the trade and investment fields leads to a virtually complete overlap of the two systems').

⁸⁰ See, e.g., WTO, *India – Measures Affecting the Automotive Sector – Report of the Appellate Body*, 19 March 2002, WT/DS146/AB/R, WT/DS175/AB/R.

⁸¹ WTO, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector; Canada – Measures Affecting the Feed-in-Tariff Program – Report of the Appellate Body*, 6 May 2013, WT/DS412/AB/R, WT/DS426/AB/R.

⁸² NAFTA (UNCITRAL), *Mesa Power Group v. Canada*, Notice of Arbitration, 4 October 2011.

⁸³ 'Linking Up to Trade and Investment Networks Can Help Fast-Track Growth – Azevêdo', *WTO News*, 15 October 2014, available at www.wto.org/english/news_e/spra_e/spra37_e.htm.

environmental challenges. A structural pro-trade bias is located throughout the GATT. Its preamble defines core objectives as the ‘substantial reduction of tariffs and other barriers to trade’ and the ‘elimination of discriminatory treatment in international commerce’.⁸⁴ Also, the very notion of ‘nullification or impairment’ under GATT Article XXIII denotes a measuring unit of a trading nation’s loss of export precipitated by another trading nation’s trade-restrictive policy, be it technically a violation or not. Consider too the pro-trade bias inherent in the GATT’s textual dichotomy between general obligations (such as the principles of MFN and national treatment) and exceptions (such as protection of the environment and human health). These non-trade values may prevail only as an inferior value – as an ‘exception’. Since exceptions are typically interpreted narrowly, the prospect of successful invocation is low. It is thus perhaps unsurprising that there was not a single case in which any of these exceptions were accepted under the old GATT.⁸⁵

In the case of international investment law, the colonialist past shaped an immediate pro-investor bias. BITs were conceived as a direct response to large-scale expropriation and nationalization throughout the developing world. Throughout the 1960s and 1970s, developed states would strategically deploy BITs to substitute for, and contest at the margins, radical downward shifts in the customary standard of property protection articulated by newly independent states.⁸⁶ The depth of the strategic goal of carving out a pro-investor zone of protection in early BITs is illustrated by the very absence of general exceptions (such as in the GATT) that might theoretically allow states parties to exempt themselves from treaty strictures. As discussed earlier, this pro-investor bias gathered enormous momentum with the Washington Consensus in the 1980s and 1990s when developing countries began to sign BITs in record numbers.

This pro-market bias is a structural (legal-institutional) prioritization of either market access or the protection of rights or privileges of foreign stakeholders (traders or investors) *vis-à-vis* competing societal regulatory concerns. Indeed, these two vectors of pro-market bias – market access (liberalization) and the protection of foreign stakeholders’ rights – are closely interrelated. Simply speaking, any abstract commitment for trade or investment liberalization would be meaningless without corresponding effective protection of traders or investors’ rights to operate in the receiving state, such as a license for traders to distribute imported merchandise. Therefore, any artificial distinction between market access (liberalization) and protection as mechanisms to divide the trade and investment regimes is practically and legally questionable.⁸⁷

On the trade side, one can easily uncover this interrelation between market access and rights protection in the formatting of schedules of commitments under the GATS, especially on Mode 3 (Commercial Presence). WTO members can opt in to legal coverage by either making horizontal commitments (across all services sectors)

⁸⁴ GATT, *supra* note 31, preamble.

⁸⁵ S. Cho, *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System* (2003), ch. 2.

⁸⁶ Kurtz, *supra* note 4, at 41–42.

⁸⁷ But see DiMascio and Pauwelyn, *supra* note 21, at 52–56 (distinguishing between goals of the GATT (liberalization) and BITs (protection)).

or sector-specific commitments (which cover a particular economic sector) to both the market access⁸⁸ and national treatment⁸⁹ obligations in the GATS.⁹⁰ Importantly, however, any state restriction that negatively affects either market access or rights protection (often in the form of national treatment violation) must be spelled out in the national schedule. The linkage with investment concerns is evident in the analyses of actual commitments scheduled under GATS to date, which show that states will often position sectoral commitments by reference either to domestic laws on FDI and/or to their BIT obligations.⁹¹ Guaranteeing foreign enterprises' trading rights is also one of the most important provisions in China's WTO Accession Protocol and has triggered significant litigation in the WTO.⁹² On the investment side, relevant international organizations from the Asia-Pacific Economic Cooperation to the Organisation for Economic Co-operation and Development (OECD) now call for further liberalization of foreign investment to supplement the protection of investors' rights. In recognition of this contemporary economic logic, the investment chapters of FTAs are now extending pre-establishment national treatment, which is closely related to market access, on top of the traditional post-establishment, 'protective' BIT model.⁹³

On the institutional side, early dispute resolution under both the GATT and BITs also corroborates their initial pro-market bias. The original purpose of the GATT as a trade contract was not to establish the general rule of law but, rather, to simply bind tariff reduction commitments and monitor cheating. Legal obligations were merely considered as one item in a diplomat's toolbox.⁹⁴ The 'working party' as an inchoate form of GATT dispute resolution was primarily settlement oriented. In fact, GATT contracting parties in dispute had usually settled by the time working parties had decided on a recommendation.⁹⁵ In the absence of such settlements, GATT panels would often artificially construct outcomes with a crude pro-trade bias. Such interpretative tendencies were perhaps inevitable when one considers that panels were composed largely of trade diplomats often without legal training.⁹⁶ GATT dispute settlement came to be 'dominated by a small, closely knit technocratic elite with a professional interest in the maintenance of the GATT as a regime dominated by liberal trade values'.⁹⁷

⁸⁸ GATS, *supra* note 70, Art. XVI.

⁸⁹ *Ibid.*, Art. XVII.

⁹⁰ *Ibid.*, Art. XX; WTO, Revision of Scheduling Guidelines, Doc. SC/CSC/W/19, 5 March 1999.

⁹¹ Adlung *et al.*, 'FOG in GATS Commitments: Boon or Bane', WTO: Staff Working Paper no. ERSD-2011-04, March 2011, at 10–11.

⁹² See, e.g., WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body*, 21 December 2009, WT/DS363/AB/R. Protocol on the Accession of the People's Republic of China, Doc. WT/L/432, 23 November 2001, pt. I, para. 15(b).

⁹³ Steger, *supra* note 78, at 162–163.

⁹⁴ Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', 4 *Journal of World Trade Law* (1970) 615, at 624.

⁹⁵ Jackson, 'GATT as an Instrument for the Settlement of Trade Disputes', 61 *American Society of International Law Proceedings (ASILP)* (1967) 144.

⁹⁶ Young, 'Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats', 29 *International Lawyer* (1995) 389.

⁹⁷ Trebilcock and Howse, *supra* note 50, at 117.

The basic architecture of investor–state arbitration (ISA) had become a default pattern by the time developing countries began signing BITs competitively in the 1980s and 1990s. Here, arbitrators arbitrate, rather than judicially review, state measures with little room for states to justify law or regulation through the invocation of public interest.⁹⁸ The legacy of commercial arbitration entrenched in the ISA mechanism is structurally biased in favour of a private law paradigm in which the host government might be deemed nothing but another party (respondent) in a private contract. This private law legacy is often revealed in a robust tendency in ISA reasoning to prioritize outcome over process. In *Metalclad v. Mexico*, for example, the tribunal used NAFTA’s articulation of ‘transparency’ as a general treaty objective to build a highly stringent standard of application for Article 1105 of NAFTA.⁹⁹ The tribunal ruled that this requires a NAFTA state to ensure that all relevant legal requirements must be capable of being readily known to foreign investors and that ‘[t]here should be no room for doubt or uncertainty on such matters’.¹⁰⁰

This interpretative approach was rightly criticized by a judge of the Supreme Court of British Columbia (within the seat of arbitration) as a misstatement of applicable law given the failure to follow NAFTA Article 1105’s express textual connection to treatment at international law.¹⁰¹ *Metalclad* can be critiqued on deeper grounds than pure hermeneutics. Substantively, this award sets an extraordinarily high standard of public regulation to which all states might aspire, but very few (especially developing countries) would realistically attain.¹⁰² The crude approach taken in the *Metalclad* award is neither exceptional nor aberrant. It is echoed across the later *Tecmed v. Mexico* award, especially in the strict formula that a state must ‘act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor’.¹⁰³ Here, too, poor hermeneutics tell part of the story. The *Tecmed* tribunal elected to orientate its expansive approach by repeatedly invoking the ‘basic expectations’ of foreign investors looking to invest in a host state rather than assessing the bargain set down by the states parties in the applicable treaty, as is required by the customary rules of treaty interpretation.¹⁰⁴

⁹⁸ G. Van Harten, *Sovereign Choices and Sovereign Restraints: Judicial Restraint in Investment Treaty Arbitration* (2014), at 66–67.

⁹⁹ NAFTA, *supra* note 69, Art. 102(1): ‘The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to ...’

¹⁰⁰ ICSID, *Metalclad Corporation v. Mexico*, Award, 30 August 2000, ICSID Case no. ARB(AF)/97/1, para. 76.

¹⁰¹ *Mexico v. Metalclad Corporation*, 2001 BCSC 664, (2001) 89 BCLR (3d) 359 (Canada) (Tysoe J), paras 68–70.

¹⁰² See Alvarez, ‘Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?’ 60 *Alabama Law Review* (2009) 943, at 964–965 (describing the *Metalclad* award as leading to ‘particularized standards of good governance requiring a level of transparency that even US municipalities would find difficult to satisfy’).

¹⁰³ ICSID, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award, 29 May 2003, ICSID Case no. ARB(AF)/00/2, para. 154.

¹⁰⁴ *Ibid.*

Naturally, such strong pro-investor bias has deprived most BITs of appropriate flexibility to safeguard government intervention for broader public interests, such as the protection of the environment or human health.¹⁰⁵ It is conceivable, if not inevitable, that certain public policy measures will negatively affect foreign investors and/or their investment. By requiring disputes of a fundamentally public nature to be resolved under a private commercial arbitration model, treaty framers have made the former vulnerable to the latter's inherent proclivities, such as expansive jurisdictional choices and broad standards of review.¹⁰⁶ This bias tends to complicate a subtle balance between the equally legitimate goals of investor protection and maintaining the core regulatory autonomy of states.

C *Convergence and Maturation: Rebalancing*

As widely documented, the pro-investor bias in investment law has come under severe attack.¹⁰⁷ In tandem with these criticisms, governments have gradually attempted to reinstate their self-suspended regulatory space through investment treaty reform. José Alvarez vividly captures this new and important development in his thesis of the 'Return of the State'.¹⁰⁸ Their strategies and reactions have varied. Some states, such as Canada, have modified their template BIT through the explicit inclusion of regulatory flexibilities modelled on GATT Article XX and/or GATS Article XIV.¹⁰⁹ Others have taken a more radical path, temporarily forsaking the ISA mechanism (Australia) or terminating investment treaty commitments entirely (Bolivia, Ecuador, Venezuela, South Africa, Indonesia and, most recently, Italy, which has withdrawn from the Energy Charter Treaty).¹¹⁰

The contemporary, transformed international economic landscape has added momentum to this paradigm shift. Ever-intensifying globalization has altered the

¹⁰⁵ The NAFTA Free Trade Commission later overrode the aforementioned overbroad interpretation by investor–state arbitration (ISA) panels in *Pope & Talbot* and *Metalclad*.

¹⁰⁶ Van Harten, *supra* note 98, at 4–5.

¹⁰⁷ Regarding a variety of challenges to the international investment regime, see Salacuse, 'The Emerging Global Regime for Investment', 51 *Harvard International Law Journal* (2010) 427, at 468–471. See also Bracken, 'U.S., EU TTIP Negotiators Defend ISDS at Consumer-Related Stakeholder Event', *International Trade Reporter*, 26 June 2014; Beattie, 'Investment Treaties: EMS Have a Rethink', *Financial Times (Beyond BRICS)*, 16 October 2014, available at <http://blogs.ft.com/beyond-brics/2014/10/16/investment-treaties-ems-have-a-rethink/>.

¹⁰⁸ See notably Alvarez, 'The Return of the State', 20 *Minnesota Journal of International Law* (2011) 223.

¹⁰⁹ Kurtz, 'The Intersections between International Trade and Investment Law: Mapping a Research Agenda', in N.J. Calamita, D. Earnest and M. Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law* (2013) 165. See generally Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 13 *JIEL* (2010) 1037; Wagner, 'Regulatory Space in International Investment Law and International Trade Law', 36 *University of Pennsylvania Journal of International Law* (2014) 1.

¹¹⁰ See Gordon and Pohl, 'Investment Treaties over Time', OECD Working Papers on International Investment no. 2015/02 (2015); Bland and Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties', *Financial Times*, 26 March 2014; Carsten Steinhauer, 'Italy Withdraws from the ECT', *National Law Review*, 21 April 2015, available at www.natlawreview.com/article/italy-withdraws-energy-charter-treaty. Energy Charter Treaty 1994, 2080 UNTS 95.

foreign investment environment by producing countless multinational enterprises and their subsidiaries spanning over different countries.¹¹¹ By the onset of the 21st century, several emerging economies (Brazil, China, India, the Russian Federation and South Africa) have become capital exporters as well as capital importers. Much of their outward investment has found destination in other developing countries, leading to sizeable growth in South–South BITs and a far more diverse set of perspectives on what investment commitments should contain.¹¹² In an unsettled post-financial crisis world, the conventional interest alignment of capital-importing and capital-exporting countries is often reversed. In September 2012, a state-owned Chinese insurance company commenced action against Belgium under the Belgo-Chinese BIT (2005) for Belgium's nationalization of the Fortis financial group in which the Chinese company had invested €1.8 billion.¹¹³ Now even developed countries may be situated on the defensive in ISA cases.

It is the 'Return of the State' phenomenon in investment law that offers a central point of convergence with trade law. This momentous political dynamic laid a firm ground for the juridical shift towards convergence, which would have been deemed purely endogenous. As we saw earlier, a pro-trade bias was prevalent in the old GATT. In *Thai Cigarettes*, a GATT panel sided with the USA's claim, championed by multinational tobacco manufacturers, against a Thai ban on foreign cigarettes to prevent early addiction of young and female smokers. Even the World Health Organization endorsed the Thai ban as it cited Latin American experience in which less radical regulation (such as regulations on advertising) proved ineffective in the face of shrewd tactics by multinational tobacco companies.¹¹⁴ Yet the panel itself quickly rejected this defence and expert evidence in a summary and dismissive manner. The GATT overcame its deep pro-trade bias via both institutional and interpretive transformation. The creation of the WTO after the turbulent Uruguay Round ushered in a new telos of the world trading system, such as 'expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development'.¹¹⁵ The new telos subsequently guided, albeit implicitly, lines of the WTO case law that sought to seriously reconcile trade and non-trade values.

¹¹¹ See generally Lee, *supra* note 3.

¹¹² UNCTAD, 'South-South Investment Agreements Proliferating', IIA Monitor no. 3 (2007), at 1.

¹¹³ See, e.g., Berger, 'Recognizing the Signs of the Times: Investment Protection in the 21st Century', *The Current Column (German Development Institute)*, 22 October 2012, available at www.files.ethz.ch/isn/157012/German-Development-Institute_Berger_22.10.2012.pdf (recognizing the recent trend in which investors from developing countries sue host (developed) countries for investment protection).

¹¹⁴ 'Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques.' WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Thai Cigarettes) – Report of the Appellate Body*, 17 June 2011, WT/DS371/AB/R, para. 55. See also 'Big Tobacco Bullies', *New York Times*, 15 December 2013, available at www.nytimes.com/2013/12/16/opinion/big-tobacco-bullies.html; Tavernise, 'Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws', *New York Times*, 13 December 2013, available at www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html.

¹¹⁵ WTO Agreements, *supra* note 64, preamble, rec. 1.

It is vital here to also underscore the transformational role of the new Appellate Body as a judicial agent of recalibration.¹¹⁶ *United States – Gasoline*, the inaugural decision of the Appellate Body, is a powerful illustration of this point. In striking down the USA's controversial gasoline purity regulation, the Appellate Body clearly acknowledged the legitimacy and vitality of the US general policy objective – the protection of clean air – in contrast to the general position taken by the GATT Panel in *Thai Cigarettes*.¹¹⁷ What the Appellate Body faulted was the way in which that policy was applied. It nudged the executive to modify its internal regulation in a way that would take into account the interests of US trading partners, such as Brazil and Venezuela, which had been negatively affected by the original gasoline rules.¹¹⁸ Importantly, however, the WTO tribunal was not the only organ that recalibrated the originally skewed balance between trade and regulation under the GATT. Governments themselves established, via negotiation, the new WTO side agreements, such as the SPS Agreement and the TBT Agreement, paving firm ground for overcoming the original pro-trade bias by actively recognizing legitimate regulatory space (the right to regulate) reserved for WTO members.¹¹⁹

International investment law has only recently embraced this paradigm shift in earnest. This tardy maturation in its jurisprudential ontogenesis eloquently demonstrates the depth of the original pro-investor bias. Most of all, the lack of the 'embedded liberalism' compromise built in GATT Article XX (on general exceptions), which is absent in early BITs, structurally favoured capital-exporting (developed) countries over capital-importing (developing) countries. Even developed countries in the GATT recognized that they too would import products and, thus, would require appropriate flexibility to restrict such imports for key regulatory reasons. But, as capital flowed in a relatively static direction through the 1960s to 1990s, rigidity (in contract theory terms) across BITs systematically impacted only developing states (as capital importers) while advantaging investors (and by extension, their home states as capital exporters).¹²⁰ Thus, the only demand for flexibility (through exceptions) would come from the developing state partner to a given bilateral negotiation, which would inevitably be weakened both by capacity constraints (in identifying the precise scope of investment treaty disciplines) and sharp asymmetry in bargaining power. Now, in the contemporary global setting with multi-directional capital flows, a broad range of states parties (whether developed or developing) are increasingly contracting under a

¹¹⁶ Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', 27 *EJIL* (2016) 9.

¹¹⁷ WTO, *United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body*, 29 April 1996, WT/DS2/AB/R, 19.

¹¹⁸ *Ibid.*, at 28.

¹¹⁹ SPS Agreement, *supra* note 46; Agreement on Technical Barriers to Trade (TBT Agreement) 1994, 1868 UNTS 120.

¹²⁰ For application of this aspect of economic theory to international investment treaties, see van Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis', 12 *JIEL* (2009) 507. For usage of contract theory in public international law more generally, see also R. Scott and P. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (2006).

veil of ignorance and, thus, have rational incentives to inject an appropriate degree of flexibility into their treaty structures as they can no longer predict with any accuracy when and upon whom rigidity will impact.¹²¹

Of course, there are multiple strategies by which flexibility to pursue public regulation can be injected into newer treaties. That said, as a matter of newer treaty practice, states parties are clearly prioritizing the insertion of exceptions to substantive obligations.¹²² And what is most striking is that an array of states have explicitly modelled these new exceptions on parts of the WTO.¹²³ Canadian treaty practice is representative of this modelling dynamic whereby WTO law provides the conceptual inspiration for the structure and operation of the investment treaty exception.¹²⁴ Other states parties have chosen to pursue an even deeper integration model in newer FTAs that seems to substantively harmonize exception provisions across trade and investment commitments. The 2011 Comprehensive Economic Partnership Agreement between Japan and India is an illustrative example of this fundamental choice: 'For the purposes of Chapters 6 [Trade in Services] and 8 [Investment], Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, *mutatis mutandis*.'¹²⁵

However, there are inherent limits to this reform strategy given the difficulty, both as a matter of pragmatics and transaction costs, of pursuing treaty making or amendment. Arbitrators, in turn, were and continue to be challenged by the need to construct interpretative and juridical tools that appropriately balance investment and other public policy goals. Indeed, the *Thai Cigarettes* moment for international investment law coincided with the Argentinean financial crisis. Since 2001, major multinational investors in Argentina have attempted to recoup their business losses resulting from Argentina's economic crisis through the international investment arbitration regime, which has led to more than 30 investment disputes whose accumulated claims have reached US \$17 billion (which nearly equalled the annual budget of the Argentinean government).¹²⁶ Several far-reaching pro-investor arbitral awards involving Argentinean crisis measures provided a perfect storm for the

¹²¹ Van Aaken and Lehmann, 'Sustainable Development and International Investment Law', in R. Ehandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy* (2013) 317, at 331–332.

¹²² Spears, *supra* note 109, at 1059–1064.

¹²³ For a political economy approach to this type of diffusion of norms, see Fabrizio, 'Transnational Diffusion: Norms, Ideas and Policies', in W. Carlsnaes *et al.* (eds), *Handbook of International Relations* (2012) 453; Baccini, Dür and Hafel, 'Imitation and Innovation in International Governance: The Diffusion of Trade Agreement Design', in A. Dür and M. Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (2015) 167.

¹²⁴ Canada Model Bilateral Investment Treaty (2004), available at www.italaw.com/investment-treaties, Art. 10(1). For analysis and critique of the use of WTO exceptions in Canadian treaty practice, see Levesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy', in R. Ehandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy* (2013) 363.

¹²⁵ Comprehensive Economic Partnership Agreement between Japan and the Republic of India, 16 February 2011, available at www.mofa.go.jp/region/asia-paci/india/epa201102/index.html, Art. 11(2).

¹²⁶ Van Harten, *supra* note 98, at 2; Lowe, 'Some Comments on Procedural Weakness in International Law', 98 *ASILP* (2004) 37, at 39.

hermeneutical shift.¹²⁷ Although some of the Argentinean BITs explicitly include a general exception clause (including for the preservation of ‘public order’ or ‘essential security interests’), these arbitration panels refused to accept that any such emergency situation could qualify even amid the vortex of the Argentinean crisis exhibiting street riots, bank runs, colossal unemployment and political paralysis.¹²⁸ The deep-rooted pro-investor bias underlying these applicable BITs, largely eclipsed the potential role of such an exception clause. In a frustrating series of decisions vividly echoing *Thai Cigarettes*, most ICSID arbitrators ruled in favour of foreign investors by second-guessing that Argentina could have hypothetically adopted more investor-friendly measures in responding to the crisis than the suspension of contractual guarantees and other investor protections.¹²⁹

Critically, direct arbitral engagement with WTO jurisprudence engineered a counter interpretation against this pro-investor bias. In the *Continental v. Argentina* arbitral award, one can locate a careful and sophisticated use of WTO exceptions jurisprudence to guide adjudication of a somewhat similar (but not identical) investment treaty exception.¹³⁰ The *Continental* decision is a significant improvement from earlier awards that simply conflated the treaty exception with the necessity principle under customary international law.¹³¹ At the same time, a series of subsequent decisions – such as the *CMS, Enron* and *Sempra* Annulment Committee rulings – reversed either the reasoning or the outcomes of the pro-investor arbitral awards against Argentina.¹³² Some of these Annulment Committee reports closely parallel the model of appellate review in the WTO by overturning awards where legal error has poisoned an analytical sequence.¹³³

More broadly, some investment arbitrators have elected to narrow the ‘socio-cultural distance’ from public international lawyers by learning (rather than simply

¹²⁷ Stone Sweet, ‘Investor-State Arbitration: Proportionality’s New Frontier’, 4 *Law and Ethics of Human Rights* (2010) 48, at 49 (observing that such interpretive change is more than a doctrinal issue considering the highly political nature of those disputes), at 68–69 (warning that the International Centre for Settlement of Investment Disputes (ICSID) system could ‘collapse’ if it fails to develop a coherent interpretive framework in pending cases in half of which Latin American countries are involved).

¹²⁸ *Ibid.*, at 49.

¹²⁹ Alvarez and Khasmsi, *supra* note 1, at 398–402. For an arbitration decision that upheld Argentina’s invocation of the exception clause, see ICSID, *Continental Casualty Company v. Argentina*, Award, 5 September 2008, ICSID Case no. ARB/03/9.

¹³⁰ For an account supporting the *Continental* tribunal’s interpretative method as well as its substantive rulings, see Kurtz, ‘Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis’, 59 *International and Comparative Law Quarterly* (2010) 325. But for an opposing account that is deeply critical of the *Continental* award, see Alvarez and Brink, *supra* note 1.

¹³¹ ICSID, *CMS Gas Transmission Company v. Argentine Republic*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ICSID Case no. ARB/01/8, para. 130.

¹³² *CMS*, *supra* note 131; ICSID, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ICSID Case no. ARB/01/3; ICSID, *Sempra Energy International v. Argentine Republic*, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, ICSID Case no. ARB/02/16.

¹³³ David Caron, ‘Framing the Work of ICSID Annulment Committees’, 6 *World Arbitration and Mediation Review* (2012) 176, at 191–192.

borrowing) from the GATT/WTO jurisprudence.¹³⁴ Here, one can identify a common and superior jurisprudential pattern in both sides featuring a strong procedural tendency.¹³⁵ Under the WTO system, this is a doctrine of ‘evenhandedness’, which has been developed from the *chapeau* test under GATT Article XX and the recent case law concerning Article 2.1 of the TBT Agreement.¹³⁶ Markedly, investment arbitral decisions also exhibit a similar interpretive tendency. In the absence of a general exception clause or other provision guaranteeing the right to regulate, some investment arbitral tribunals have interpreted the national treatment obligation in a way that takes seriously both regulatory context and purpose. This juridical move is clearly on display in one of the earliest national treatment cases – *S.D. Myers v. Canada* – as well as in a range of successive awards that have endorsed a purpose-based approach.¹³⁷

In *S.D. Myers*, the tribunal rightly pointed out a critical distinction between the non-discrimination obligation in the WTO and under Chapter 11 of NAFTA. It observed that:

[i]n the GATT context, a prima facie finding of discrimination in ‘like’ cases often takes place within the overall GATT framework, which includes Article XX (General Exceptions). A finding of ‘likeness’ does not dispose of the case. It may set the stage for an inquiry into whether the different treatment of situations found to be ‘like’ is justified by legitimate public policy measures that are pursued in a reasonable manner.¹³⁸

Referencing the OECD’s Declaration on International and Multinational Enterprises, the arbitral panel then underscored that the interpretation of ‘likeness’ must engage the policy objectives underlying the government measure in dispute, such as environmental concerns.¹³⁹ This is a subtle interpretive choice that ‘marries adverse competitive impact with an assessment of impermissible regulatory purpose’.¹⁴⁰ The default value of this motive-based approach is to establish a basic content of regulatory governance; that the autonomy of host state choice is only displaced if purposefully abused. The *S.D. Myers* tribunal has thus identified a new hermeneutical space

¹³⁴ See Hirsch, ‘The Sociology of International Investment Law’, in Z. Douglas *et al.* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 143.

¹³⁵ Cf., Thelen, ‘Historical Institutionalism in Comparative Politics’, 2 *Annual Review of Political Science* (1999) 369, at 386–387.

¹³⁶ See WTO, *United States – Certain Country of Origin Labelling Requirements – Report of the Appellate Body*, 29 June 2012, WT/DS386/AB/R; WTO, *United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products – Report of the Appellate Body*, 16 May 2012, WT/DS381/AB/R; WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body*, 4 April 2012, WT/DS406/AB/R.

¹³⁷ For an overview of the ISA jurisprudence that has endorsed a role for investigation of state purpose in a national treatment inquiry, see Kurtz, ‘Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex and Vital Search for State Purpose’, in A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy, 2013–2014* (2015) 251. *S.D. Myers*, *supra* note 76.

¹³⁸ *S.D. Myers*, *supra* note 76, para. 246.

¹³⁹ *Ibid.*, paras 248, 250.

¹⁴⁰ Kurtz, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents’, 20 *EJIL* (2009) 749, at 760–761; DiMascio and Pauwelyn, *supra* note 21, at 83 (discussing ‘regulatory context’ test).

in likeness to produce an appropriate balance between the market and state regulation.¹⁴¹ Overcoming the inherent pro-trade or investment bias embedded in the typical likeness test, the tribunal's interpretation approximates the WTO's evenhandedness doctrine in that such interpretation tends to consider not only the purpose of the measure but also the relevant regulatory process in general.

A jurisprudential convergence between the two systems focused on procedural regulatory integrity transcends the shared obligation of non-discrimination. Select components of the fair and equitable treatment case law have tested host state regulatory choice by examining a state's invocation of scientific justification in its deference of a given measure under arbitral review. This proffered role reveals further jurisprudential commonality with a key aspect of WTO law. Since the completion of the Uruguay Round, a degree of scientific justification has been required of WTO members when promulgating certain measures under the SPS Agreement. This newer component of the WTO represents a dramatic shift in legal coverage and philosophy. Classically, the GATT 1947 only disciplined discriminatory domestic taxes or regulations that sought to protect domestic production in line with a negative integration ethos. States were free to regulate domestically as they sought fit; such interventions would only be struck down if poisoned by protectionist animus. Yet, under the new SPS Agreement, even non-discriminatory measures can be challenged because, for example, they impose greater burdens on producers in the exporting state. These burdens may not be strictly protectionist but, instead, reflect heterogeneity in regulatory preferences and methodologies between different states. If the importing state cannot now show that its non-discriminatory measures are truly required for safety and health purposes, as defined by science, these measures cannot stand under the SPS Agreement. The SPS Agreement thus ushers in a harder positive integration edge to WTO commitments in its understanding that regulatory intervention, even when non-protectionist, can be economically inefficient and politically irrational if not informed by scientific inquiry in appropriate settings.¹⁴²

Paradoxically, perhaps, stronger legal coverage of this type is less controversial to the traditional proponents of international investment law. Compared with the WTO, the idiom of investment law and arbitration has always prioritized the establishment of absolute, rather than relative, standards of protection. To that extent, the usage of scientific justification as a proxy for rational regulation – which, properly formulated, would still contemplate legitimate variances in individual state choice on risk regulation – is a more modest legal strategy than the overblown and intrusive demands made of host states by arbitral awards such as *Metaclad v. Mexico* and *Tecmed v. Mexico*. Indeed, this modest reading has begun to find early reflection in a subset

¹⁴¹ Cf., ICSID, *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility, redacted version, 15 January 2008, ICSID Case no. ARB(AF)/04/1, para. 121 (emphasizing that the 'like products' test under GATT Article III:4 is 'a separate and distinct test' from the 'like circumstances' test under NAFTA Article 1102).

¹⁴² For an insightful analysis of this shift in the nature of WTO obligations ushered in by the SPS Agreement, see generally Neven and Weiler, 'Japan – Measures Affecting the Importation of Apples (AB-2003-4): One Bad Apple?', in H. Horn and P. Mavroidis (eds), *The WTO Case Law of 2003* (2006) 280.

of fair and equitable cases such as *Methanex v. United States*, *Chemtura v. Canada* and, most recently and seemingly controversially, *Bilcon v. Canada*.¹⁴³ Critically, the nature of the inquiry into the usage of science in these arbitral awards has closely paralleled the most sensitive (and procedurally orientated) elements of the WTO jurisprudence under the SPS Agreement.

Of course, the framing of the different component parts of the SPS Agreement and its attendant jurisprudence is a study in deep complexity and, on occasion, contradiction. The following analysis is not exhaustive but selectively focused to identify points of sustainable hermeneutical convergence between the two systems. As a starting position, assuming that there is no relevant international standard in operation or that the WTO member wants to implement a health and safety measure at a higher level of protection than that set out in a given international standard, the primary limitation on sovereignty in the SPS Agreement is that a state's measure must be 'based on' risk assessment,¹⁴⁴ which requires a state to take into account, *inter alia*, 'available scientific evidence'.¹⁴⁵ Early WTO jurisprudence has afforded appropriate latitude to domestic regulators on this procedural requirement to undertake dedicated risk assessment. In *EC – Hormones*, for instance, the Appellate Body ruled that such risk assessment need not establish a strict quantitative threshold of risk¹⁴⁶ provided that it is sufficiently specific (relating to particular, rather than general and theoretical, risks) and driven by empirical inquiry.¹⁴⁷ The Appellate Body has also sensibly understood the obligation that a state's SPS measure be 'based on' risk assessment – in line with what the text naturally suggests – as requiring a 'rational relationship' between the chosen measure and a state's risk assessment.¹⁴⁸

Under this approach, all that is required of the WTO member is evidentiary support within the risk assessment for a rational connection between the SPS measure and the achievement of its optimal level of risk. Rationality review of this sort boils down to a fairly minimal requirement that there must be some reasonable contribution by the SPS measure to the reduction or elimination of the identified risks.¹⁴⁹ The Appellate Body even went on to confirm that a measure could still be 'based on' risk assessment if scientific assessments were divided and the measure relies on minority, as opposed to mainstream, scientific opinion.¹⁵⁰ Under this particular line of WTO jurisprudence, then, science is by no means a simple trump card that is automatically and conclusively determinative of regulatory integrity. Instead, science operates (including through state reliance on minority scientific opinion) as one key criterion with

¹⁴³ NAFTA (UNCITRAL), *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v. Canada*, Award on Jurisdiction and Liability, 17 March 2015.

¹⁴⁴ SPS Agreement, *supra* note 46, Art. 5(1).

¹⁴⁵ *Ibid.*, Art. 5(2).

¹⁴⁶ WTO, *EC – Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 186.

¹⁴⁷ *Ibid.*, para. 200.

¹⁴⁸ *Ibid.*, para. 193.

¹⁴⁹ 'We believe that Article 5.1 ... requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake.' *Ibid.*

¹⁵⁰ *Ibid.*, para. 194.

which to assess the overall regulatory rationality of democratic deliberation of risk regulation.¹⁵¹

There is a striking parallel between this promising line of SPS jurisprudence and select components of the fair and equitable case law. *Methanex v. United States* is the first ISA award to substantively examine the use of science in an area of risk regulation, being a phased Californian ban on the use of methyl tertiary butyl ether (MTBE), an octane enhancer in unleaded gasoline.¹⁵² The use of oxygenates in refined petroleum was required by Californian and federal law in order to reduce gasoline-related air pollution.¹⁵³ In the early parts of the award, the tribunal exhaustively records the factual chronology of the election of the Californian legislature to ban the use of MTBE. The origins of the ban lay in the decision of the Californian legislature to commission and fund an independent agent – the University of California – to scientifically assess various risks associated with the use of MTBE.¹⁵⁴ These included the risk to human health and the environment through MTBE leaking from underground storage tanks into groundwater supplies.¹⁵⁵ After a thorough review of this regulatory process (including its openness to affected actors such as Methanex), the tribunal concluded that the ban on MTBE was ‘not the product of a political sham engineered by California’ but, rather, ‘a serious, objective and scientific approach to a complex problem’.¹⁵⁶ Of course, this careful and extensive assessment of the scientific justifications for the MTBE ban received no direct attention in the tribunal’s legal analysis of fair and equitable treatment. It is instead quarantined in the factual findings of the award. Yet this procedural review of the legislative record provides clear and compelling evidence, as the Tribunal itself determines, of a clearly rational approach to risk regulation.

Chemtura v. Canada is a further (and more recent) case to directly assess scientific evidence as part of a fair and equitable challenge.¹⁵⁷ The *Chemtura* award not only matches the sensitivity of the *Methanex* approach in its WTO-like treatment of scientific evidence but also explicitly (and, for the most part, thoughtfully) incorporates these findings in its legal evaluation of the fair and equitable standard. At issue was the legality of Canada’s ban on lindane, a pesticide used in the production of canola. Part of the claimant’s primary allegation questioned the Canadian regulator’s use of science in the procedure surrounding an investigation into the health consequences of exposure to lindane. Although not without doubt, the overall framing of this claim appears to be directed at the sensitive question of how science is employed to set a state’s optimal level of risk.¹⁵⁸ The *Chemtura* tribunal, however, was appropriately

¹⁵¹ For extended analysis of this point, see Howse, ‘Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization’, 98 *Michigan Law Review* (2000) 2329, at 2333–2338.

¹⁵² NAFTA (UNCITRAL), *Methanex Corporation v. United States*, Final Award, 3 August 2008.

¹⁵³ *Ibid.*, pt III, ch. A, paras 4–6.

¹⁵⁴ *Ibid.*, pt III, ch. A, para. 1.

¹⁵⁵ *Ibid.*, pt III, ch. A, para. 2 (Topic Three).

¹⁵⁶ *Ibid.*, pt III, ch. A, para. 101.

¹⁵⁷ NAFTA (UNCITRAL), *Chemtura Corporation v. Government of Canada*, Award, 2 August 2010.

¹⁵⁸ ‘[T]he Claimant further argues that the scientific basis for the outcome of the Special Review was insufficient.’ *Ibid.*, para. 153.

quick to reject that implicit invitation. Echoing a long-standing component of WTO jurisprudence on the SPS Agreement, it ruled that ‘it is not for the Tribunal to judge the correctness or adequacy of the scientific results of the Special Review, not even those questioned by the Board of Review’.¹⁵⁹ Indeed, it endorsed expert witness evidence that the Canadian agency had responsibly chosen a conservative safety tolerance, implying that this choice is the state’s alone.¹⁶⁰ An almost identical foundational position is evident throughout the SPS case law, including the Appellate Body’s report in *Australia – Salmon*.¹⁶¹ This is not the only sensible and important parallel at play with WTO law. As with the treatment of minority scientific opinion in *EC – Hormones*, the *Chemtura* tribunal explicitly and pointedly recognized that ‘scientific divergence ... cannot in and of itself serve as a basis for a finding of breach of Article 1105 of NAFTA’.¹⁶²

Most recently, *Bilcon v. Canada* has continued this legal positioning of fair and equitable treatment as a discipline on regulatory irrationality. At issue was Canada’s rejection of a proposal by a set of American investors to operate a quarry and marine terminal in Nova Scotia.¹⁶³ The tribunal found that Canadian law required the Canadian environmental regulator to consider a set of mandatory factors in undertaking an environmental assessment of the project. These mandatory considerations encompassed consideration of quantitative probability of adverse environmental effects as well as investigation of different measures to mitigate those adverse effects.¹⁶⁴ The tribunal was at pains to point out that these science-based elements were not exclusive considerations since an assessment of this sort ‘necessarily involves public input’.¹⁶⁵ However, the tribunal ruled that Canada had failed to consider these mandatory factors altogether and, instead, had relied predominantly on incompatibility with an amorphous notion of ‘community core values’ (that had no firm foundation in Canadian law).¹⁶⁶ For the tribunal, Canada’s failure to consider these compulsory factors constituted arbitrariness in breach of Article 1105(1) of NAFTA.¹⁶⁷ This ruling triggered a fierce dissent by Donald McRae, who, in raising the prospect of prioritization of ‘socio-economic considerations’ and, thus, regulatory chill, suggested that the

¹⁵⁹ *Ibid.*, para. 153.

¹⁶⁰ *Ibid.*, para. 154.

¹⁶¹ Consider this pertinent extract: ‘We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as “the level of protection deemed appropriate by the Member establishing a sanitary ... measure”, is a prerogative of the Member concerned and not of a panel or of the Appellate Body.’ WTO, *Australia – Measures Affecting Importation of Salmon – Report of the Appellate Body*, 20 October 1998, WT/DS18/AB/R, para. 199 (emphasis in original).

¹⁶² *Chemtura v. Canada*, *supra* note 157, para. 154.

¹⁶³ *Bilcon v. Canada*, *supra* note 140, para. 5.

¹⁶⁴ *Ibid.*, para. 477.

¹⁶⁵ *Ibid.*, para. 481.

¹⁶⁶ *Ibid.*, paras 502–547.

¹⁶⁷ *Ibid.*, para. 591.

‘decision of the majority will be seen as a remarkable step backwards in environmental protection’.¹⁶⁸ Yet, this WTO-like reading of fair and equitable treatment is by no means a simple prioritization of science-based and/or economic considerations over broader community values. Indeed, the tribunal expressly ruled that the award ‘does not place economics or technology above human concerns’.¹⁶⁹ Instead – in line with the conceptual considerations that underpin the SPS Agreement’s limitation on economically inefficient and politically irrational measures – the tribunal emphasized the manner in which the sequencing and treatment of scientific evidence can appropriately inform and improve the quality of democratic deliberation of risk regulation.¹⁷⁰

These important juridical shifts have stimulated academic imaginations. Some scholars contend that investment arbitrators are now more likely to engage sophisticated hermeneutics, such as proportionality review¹⁷¹ and the extension of a margin of appreciation,¹⁷² which used to be reserved exclusively to an adjudicative tribunal, such as the WTO Appellate Body. Investment tribunals now appear to engage in judicial review¹⁷³ and exercise deference,¹⁷⁴ which are usually deemed to be exclusively reserved to adjudication. Indeed, this cultural shift among investment arbitrators may be well captured by a sociological perspective. First, there is the movement of actors across the two fields with WTO law naturally being diffused to elements through the deliberate choices of specific and identifiable judges. This diffusion goes beyond crystallized juridical elements to even encompass expectations of quality in arbitral adjudication. In *Abalclat v. Argentina*, a former WTO Appellate Body member issued a stinging dissent of ‘this excessively long award, its style of turning around the main issues and drowning them in an ocean of minutia and elaborated details rather than confronting them formally and treating them thoroughly’.¹⁷⁵ More generally, with

¹⁶⁸ NAFTA (UNCITRAL), *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v. Canada*, Dissenting Opinion of Donald McRae, 10 March 2015, PCA Case no. 2009-04, para. 51.

¹⁶⁹ *Bilcon v. Canada*, *supra* note 143, para. 736.

¹⁷⁰ *Ibid.*, paras 513–514.

¹⁷¹ See Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 47 *Columbia Journal of Transnational Law* (2008) 73; Stone Sweet and della Cananea, ‘Proportionality, General Principles of Law and Investor-State Arbitration: A Response to José Alvarez’, 46 *New York University Journal of International Law and Politics* (2014) 911.

¹⁷² See Burke-White and von Staden, ‘Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations’, 35 *Yale Journal of International Law* (2010) 283, at 286 (arguing that ISA tribunals should adopt a public law style standard of review, in particular, a ‘margin of appreciation’, so as to augment the legitimacy of their decisions as they increasingly review regulatory measures affecting foreign investments).

¹⁷³ Ortino, ‘The Investment Treaty System as Judicial Review: Some Remarks on Its Nature, Scope and Standards’, 24 *American Review of International Arbitration* (2013) 437 (applying the concept of ‘judicial review’ to international investment law).

¹⁷⁴ Henckels, ‘Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration’, 4 *Journal of International Dispute Settlement* (2013) 197 (arguing for more deference to state regulatory authority in the balancing of investor protection and public interest).

¹⁷⁵ ICSID, *Abaclat and Others v. Argentine Republic*, Decision on Jurisdiction and Admissibility, 28 October 2011, ICSID Case no. ARB/07/5, para. 3, Dissenting Opinion of Judge Georges Abi-Saab).

recent increases in transparency, a wide range of stakeholders, including civil society and the academy, will read, evaluate and criticize arbitral decisions. This social pressure makes investment arbitrators increasingly attentive to the accountability, both professional and intellectual, of their hermeneutical positions.

Unbeknownst to arbitrators, their ‘rebalancing’ efforts have triggered unexpected outcomes.¹⁷⁶ It has deepened the uncertainty in arbitral case law through splintering of methodological and substantive choices.¹⁷⁷ Of course, one can seek to defend this uncertainty by invoking the original conception of arbitration as an ad hoc, case-specific and settlement-oriented forum of dispute resolution. Nonetheless, the recent dramatic growth of ISA cases has seen the system’s main stakeholders – not only states but also investors – demonstrate less tolerance towards inconsistency and incoherence among arbitral awards. Against this backdrop, there is systemic advantage in the shift towards jurisprudential learning and, where appropriate, convergence, between the two systems. By carefully distilling generalized lessons from WTO jurisprudence on the reconciliation between free trade and social regulation, investment arbitrators are capable of maintaining interpretive coherency not only in individual decisions but also on the case law as a whole.¹⁷⁸ Naturally, this quasi-jurisprudential turn is geared towards the enhanced legitimacy of international investment law in general.¹⁷⁹

Markedly, our thesis is not provision specific. In other words, we do not argue that the WTO jurisprudence on national treatment (under GATT Article III) should converge with the ISA precedents on national treatment or, for that matter, that the WTO approach is always superior when it comes to reconciliation of competing values. Nor do we argue that the WTO jurisprudence on general exceptions (GATT Article XX) perfectly dovetails with targeted special exceptions in investment law. Our focus, instead, is on a discernible and broader hermeneutical convergence between trade and investment case law that actively (re-)balances market goals (exporters/investors’ rights) with governmental policy objectives.¹⁸⁰ The textual locus of such convergence varies. Yet the law of justification in the WTO, recently developed over GATT Article XX, is so extensive in its doctrinal latitude that it can

¹⁷⁶ Alvarez, *supra* note 108, at 250. See also Osgoode Hall Law School, *Public Statement on the International Investment Regime*, 31 August 2010, available at www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (problematizing the pro-investor interpretation of state-investor arbitration tribunals).

¹⁷⁷ Kurtz, *supra* note 109.

¹⁷⁸ See Mitchell and Henckels, ‘Variations on a Theme: Comparing the Concept of “Necessity” in International Investment Law and WTO Law’, 14 *Chicago Journal of International Law* (2013) 93 (arguing that employing the WTO case law on the necessity test will help international investment law formulate a consistent body of law).

¹⁷⁹ T.M. Franck, *The Power of Legitimacy among Nations* (1990), at 49 (regarding ‘coherence’ as an indicator for legitimacy in international law); Frank, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, 73 *Fordham Law Review* (2005) 1521, at 1586 (warning that incoherence in investment treaty arbitration might precipitate a legitimacy crisis).

¹⁸⁰ See Alvarez, ‘Beware: Boundary Crossings’, in T. Kahana and A. Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (2016) 43; Alvarez and Brink, *supra* note 1, at 352–358.

inform similar situated ISA disputes with varying effectiveness. Certainly, one distinctive doctrine – the ‘weighing and balancing’ test – represents the latest iteration of the contemporary WTO law of justification. However, its overall hermeneutical applications are multifaceted with a set of open-ended criteria, such as ‘contribution made by the compliance measure to the enforcement of the law or regulation at issue’, ‘importance of the common interests or values protected by that law or regulation’ and ‘accompanying impact of the law or regulation on imports or exports’.¹⁸¹ Thus, when the *Continental* tribunal referred to the law of justification under the WTO jurisprudence, it did not point to only a single WTO doctrine or case. Rather, it navigated through several WTO cases, such as *Korea – Beef*, *EC – Asbestos*, *Brazil – Tyres*, and *United States – Gambling*, in an effort to capture a context apposite to each interpretive need arising under the *United States – Argentina BIT*.¹⁸²

Lastly, this jurisprudential convergence can aid in resolving a destructive tension between ‘politicization’ and ‘depoliticization’ in international economic law. The embedded liberalism model of the GATT was predicated on a broader societal acceptance of the trade regime, which enabled countries to politically adjust their engagement with the system in times of pressure, for example, through the use of safeguards or resort to food security claims (under Article XI). Despite that original political compromise (partly reflected in the general exception clause (Article XX)), the tenacious pro-trade bias had prevented the initial compromise from being fully manifested under the old GATT system until the launch of the WTO and the issuance of a series of insightful Appellate Body decisions. Often, this unsound inertia has been attributed to incremental bureaucratization within the GATT and, to some degree, still within the WTO.¹⁸³ The pathology is something of the reverse in investment law. The BIT model was intentionally designed to depart from the political contestation surrounding customary international law (including through the problems of diplomatic protection). That has now sown the seeds of the discontent of states parties in the early technocratic, pro-investor rulings of arbitral tribunals. If anything, the key to a sustainable operation of the system is to engage again with the legitimate political adjustment that each state must undertake in offering sustainable levels of investment liberalization and protection.

4 A Glimpse into the Future: Political Fissures and Lingering Divergences

The contemporary engagement between trade and investment law stands in a moment of dynamic flux. There remain telling divergences shaped by deep variance in

¹⁸¹ WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body*, 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R.

¹⁸² *Continental*, *supra* note 129, paras 193–195. *Korea – Beef*, *supra* note 181; *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products – Report of the Appellate Body*, 12 March 2001, WT/DS135/AB/R; *Brazil – Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body*, 17 December 2007, WT/DS332/AB/R; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body*, 7 April 2005, WT/DS285/AB/R.

¹⁸³ See, e.g., Howse, ‘From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System’, 96 *AJIL* (2002) 94 (criticizing the insular culture of the WTO ‘insiders’).

the socio-political preferences of key strategic actors. Consider that one of the most recent, and especially tangible, convergence trends has been the express usage of WTO-based exceptions in newer investment treaties. This drafting strategy seeks to inject greater levels of flexibility for states to pursue public regulation in dedicated areas. However, WTO exceptions are being used to recalibrate investment treaties in ways that raise difficult (if not impossible) choices and trade-offs for select states parties. For example, some newer treaties will insert a generalizable exception based on the law of the WTO that applies across all substantive investment treaty obligations.¹⁸⁴ The implications of this strategy are profound. When a state party directly expropriates foreign property, it could excuse itself from an obligation to compensate via a plea of justification under a generalized exceptions clause. This is a significant departure from a classic assumption that has underpinned investment treaty practice since the early 1960s. Alvarez and Tegan Brink identify this animating ethos as a fundamental belief ‘that governments expropriate for public purposes and may continue to do so, but that when they do compensation still needs to be paid’.¹⁸⁵ And, to that end, these authors suggest:

[a]n exception from compensation for a *direct* taking of property because the expropriating government was pursuing one of the public purposes enumerated in GATT’s Article XX would not only be inconsistent with the BIT’s expropriation guarantee itself but also with the pre-existing customary Hull Rule which the United States had sought to incorporate in these treaties.¹⁸⁶

Of course, the tension here ultimately drills down to the incompatibility of this broad exceptions strategy with protections for private property enshrined in the Fifth Amendment (Takings Clause) to the US Constitution and other comparable constitutional settings of developed states. In many common law jurisdictions, there is often presumptive inviolability of the rights of a property holder with legislative interference only permitted, as Blackstone puts it, for ‘the general good of the whole community’ (or what we might call the public interest) and ‘by giving him full indemnification and equivalent for the injury thereby sustained’.¹⁸⁷ The question thus becomes: are states parties pursuing this significant WTO-based treaty departure from liberal precepts and giving it the careful attention it deserves? Secure and stable property rights are integral to a market economy, and requiring compensation, where this is a clear infringement of those rights, sensibly forces governments to internalize the cost of state action. In effect, it counters a presumed bias that public decision makers will undervalue the economic costs of a decision that fall largely on private actors.¹⁸⁸ By internalizing these costs, this default principle can thereby improve the overall efficiency of government conduct by ensuring a complete evaluation of the impact (both positive and negative) of state action. It is certainly telling that the contemporary US approach

¹⁸⁴ ASEAN Comprehensive Investment Agreement 2009 (entered into force 29 March 2012), Art. 14(1), Annex 2.

¹⁸⁵ Alvarez and Brink, *supra* note 1, at 342.

¹⁸⁶ *Ibid.* (emphasis added).

¹⁸⁷ W. Blackstone, *Commentaries on the Laws of England* (3rd edn, 1768), vol. 1, at 139.

¹⁸⁸ For a careful consideration of the likelihood of this presumed bias in defined settings (which the author terms a ‘fiscal illusion’) and its implications, see J. Bonnitcha, *Substantive Protection under Investment Treaties* (2014), at 69–72.

to recalibration of the expropriation norm focuses substantively on the category of indirect expropriation.¹⁸⁹ It defines a set of criteria that must be taken into account by an adjudicator in characterizing a state's act as indirect expropriation¹⁹⁰ and also provides an exception to a finding of indirect expropriation for 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives'.¹⁹¹ Yet, critically, when it comes to issues of direct expropriation, the classic requirement in US investment treaties continues to apply. A state must pay compensation to the foreign investor even when acting without discrimination and for a compelling public interest.

Yet we should be careful not to simply dismiss the justifiability of WTO-type exceptions to protection against direct expropriation simply by reference to developed state (constitutional) baselines. This is a thorny issue engaging the proper role of the state in redistribution without invoking its general power to make laws with respect to taxation. Some constitutional systems are aligned with alternative theories of private property rather than a strict liberal model of an inviolable sphere of immunity from state action. These alternate accounts acknowledge the public functions of property and regard it as a civil institution, created and shaped by society in light of changing needs. Within this alternate theoretical prism, political institutions can be understood to have authority to legitimately redistribute property in the interests of society as a whole. The state's obligation to serve the public good is thus not subordinate or external to the property owner's autonomy; both liberty and the public good are inherent values in this understanding of the law of property.

Indeed, one can identify targeted evidence of this approach in the constitutional and treaty positioning of a broad range of states. In Asian countries such as the Philippines, constitutional amendment has taken place to confirm that the use of property 'bears a social function' and that the state has a duty to 'promote distributive justice'.¹⁹² In South Africa too, while the 1996 post-apartheid Constitution guarantees compensation for expropriation, the overall compensatory calculus must reflect the 'public interest', which specifically 'includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.¹⁹³ Of course, there are significant costs associated with redistribution of this sort, not least the fact that the insecurity of holdings can result in wasteful precautions

¹⁸⁹ United States Model Bilateral Investment Treaty (US Model BIT) (2012), available at www.italaw.com/investment-treaties, Annex B (Expropriation).

¹⁹⁰ These include 'the economic impact of the government action', 'the extent to which the government action interferes with reasonable investment-backed expectations' and 'the character of the government action.' *Ibid.*, Annex B(4)(a).

¹⁹¹ *Ibid.*, Annex B(4)(b).

¹⁹² Constitution of the Republic of the Philippines, 1987, Art. XII, s. 6. But for an analysis of the manner in which the Philippines Supreme Court has blunted this constitutional agenda by taking a classic liberal position on compensation, see Allen, 'The Right to Property in Asia', in R. Dixon and T. Ginsburg (eds), *Comparative Constitutional Law in Asia* (2014) 250, at 257–258, 266–267.

¹⁹³ Constitution of the Republic of South Africa, 1996, Art. 25(2), (3), (4).

and avoidance of productive investment.¹⁹⁴ These competing goals are thus plainly in tension, and the resulting trade-offs require careful consideration by lawmakers and treaty negotiators. Yet within this alternative theoretical and constitutional position, it is anathema that one should simply give way completely to the other.

Similar political fissures and divergences surround the charged question of WTO-influenced procedural reform of investment treaty arbitration. Unlike the SPS/TBT Agreement, a multilateral treaty solution to secure regulatory autonomy has not yet emerged, except for ad hoc, case-by-case attempts under BITs or regional trade agreements.¹⁹⁵ For example, key states and groupings have begun to advocate for structural change designed to inject permanency and hierarchy to third party adjudication of investment treaty disputes. The European Union (EU), in particular, has spearheaded the idea of both a standing investment treaty tribunal and an appeal tribunal, with appointments controlled entirely by states parties.¹⁹⁶ Modelled on the WTO, the vertical hierarchy introduced by this reform item would see substantive review of rulings by first instance adjudicators for legal error, with the hope of inducing greater commitment to bounded consistency and coherence. The EU's new system has begun to attract support in counterparties to FTA negotiations including Canada¹⁹⁷ and Vietnam,¹⁹⁸ with recent plans to use the platform of these outcomes in the construction of a multilateral investment court.¹⁹⁹

Yet, at the other end of the spectrum, there are influential actors that have exhibited little willingness to disrupt the autonomy of disputing party choice (including foreign investors) on adjudicator appointment. US investment treaty practice sits at the apex where there is not even the delineation of desirable qualifications that could improve the quality and coherence of arbitral adjudication at the margins.²⁰⁰ Of course, self-interested actors – especially claimants and their advisors – will inevitably defend this

¹⁹⁴ See generally Michelman, 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', 80 *Harvard Law Review* (1967) 1165; B. Ackerman, *Private Property and the Constitution* (1977).

¹⁹⁵ We owe this insight to an anonymous referee.

¹⁹⁶ European Commission, 'Investment in TTIP and Beyond – The Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration towards an Investment Court, Concept Paper, 5 May 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF. In what might be seen as a parallel political move to give state control on the investment dispute resolution back to member states, the Court of Justice of the European Union has recently ruled that the EU does not retain exclusive competence in negotiating the investor–state dispute settlement clause inserted in FTAs. See Roberts, 'A Turning of the Tide against ISDS?', *International Economic Law and Policy Blog*, 19 May 2017, available at <http://worldtradelaw.typepad.com/ielpblog/2017/05/the-court-of-justice-for-the-european-union-fired-a-significant-shot-at-investor-state-dispute-settlement-isds-this-week-a.html>.

¹⁹⁷ Comprehensive Economic and Trade Agreement between Canada and the European Union, 19 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

¹⁹⁸ EU – Vietnam Free Trade Agreement, January 2016, ch. 8 (Trade in Services, Investment and E-Commerce), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

¹⁹⁹ European Commission, 'European Commission and Canadian Government Co-Host Discussions on a Multilateral Investment Court', press release, 13 December 2016, available at http://europa.eu/rapid/press-release_IP-16-4349_en.htm.

²⁰⁰ US Model BIT, *supra* note 189, Art. 27.

opposing position by advocating for the essential characteristics of a system of arbitration, albeit with an unstated focus on commercial arbitration.²⁰¹ However, there seems little doubt that, when it comes to investment treaty arbitration, the appointment choices made by some parties, resulting interpretative outcomes and the absence of conduct (especially conflict) checks in the system, is rapidly eroding the confidence of some states parties and broader stakeholders. We should be continually mindful here of the (at least short-term) incentives that shape the acts of party-appointed arbitrators. All have strong interests in seeking reappointment, whether by foreign investors or states.²⁰² And those market incentives can naturally see them position their rulings in direct tension with the systemic values of bounded consistency and coherence that may be vitally important to key states parties.

Yet, even here, one should be mindful of the long-term (though likely remote) possibility of system-internal reform. Within the International Centre for Settlement of Investment Disputes (ICSID), annulment committees that have reviewed some of the poor reasoning of arbitral tribunals adjudicating Argentina's response to its financial crisis have clearly engaged in *de facto* appellate review by seeking to secure correctness in result.²⁰³ Of course, this systemic development is necessarily incomplete, being confined to ICSID, and, even then, the pathway is prone to future reversal. It also potentially increases the incentives of foreign claimants to shift towards non-ICSID mechanisms if they see the historical promise of the benefits of ICSID arbitration (as a closed system immune to domestic court review) outweighed by the costs of this evolutionary shift. Yet these developments evidence an internal and organic response to a system-wide need for improvements in the coherence of adjudication. While chaotic and sub-optimal in certain settings, they reveal the potential for the existing heterogeneous system to engage in experimentation, correction and adaption.²⁰⁴

5 Conclusion

There is a temptation to ascribe (or even dismiss) the messy intersection between the international trade and investment regimes purely to exogenous factors. Those visible aspects of engagement across the fields certainly appear formidable, especially the interlocking nature of modern economic transactions and patterns. In our view, however, the real driver of convergence in the contemporary period is a strategic challenge that is inherently common to both fields. Both systems are united in the vital need to sustainably reconcile free market values and public interest. There are inherent limits by which states parties (and their negotiators) can moderate this delicate balance

²⁰¹ For a careful and accurate exposition of this element of commercial arbitration, see G. Born, *International Arbitration: Law and Practice* (2012), at 121.

²⁰² Cate, 'International Arbitration and the Ends of Appellate Review', 44 *New York University Journal of International Law and Politics* (2012) 1110, at 1151–1154.

²⁰³ Caron, *supra* note 133, at 191–192.

²⁰⁴ Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed', 1 *ICSIDR* (2014) 4.

through treaty negotiation or amendment. At some point, adjudicators in both systems must give effect to sovereignty constraints often in factual matrices that raise sensitive questions of regulatory variance between states.

We are now witnessing select jurisprudential convergence across international trade and investment law that, to a very real degree, strikes a sophisticated reconciliation between market goals and public interests. Much of that common jurisprudence employs different nodes and qualities of procedural review, an appropriately sensitive choice given the contested nature of modern international economic law disputes. There are, to be sure, counter trends and jurisprudential patterns within both systems. It is doubtful, however, that these opposing lines, which are often tilted too far in either a pro-market or crudely pro-state direction (especially in recent investment treaty arbitrations), will be as successful in fostering deep levels of state and stakeholder commitment.

At the same time, however, it is important to be mindful of continuing divergences and variances. Opposition to norm transplant from one system (WTO) to another (investment law) should not be summarily dismissed as irrational. Carefully considered, there may be important reasons to shape incoming norms to better reflect core socio-political preferences of states parties. The WTO dispute settlement system is also now being presented as a larger, institutional reform model for investment law by influential states parties. Yet it is important to recognize that the current system of investment arbitration is in flux and has shown itself somewhat capable of internal correction and adaptation. Of course, this only begs the larger question of whether that level of system-internal reform is sufficient, collectively or individually, to maintain the long-term confidence of states parties.